UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: THE BEAR STEARNS COMPANIES INC. SECURITIES, DERIVATIVE AND EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	Case No. 1:08-md-01963 (RWS) **Hearing Date: November 24, 2008** **Time: 10:00 am.** **Court Room: 18C**
SAMUEL T. COHEN, derivatively and on behalf of BEAR STEARNS COMPANIES, INC., Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 07-CV-10453 (RWS)
JEROME BIRN, Derivatively on Behalf of THE BEAR STEARNS COMPANIES, INC., Plaintiff, vs. JAMES E. CAYNE, *et. al.*, Defendants.	Case No. 08-CV-0855 (RWS)
EASTSIDE HOLDINGS, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-2793 (RWS)
AARON HOWARD, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-2804 (RWS)

RAZILL C. BECHER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-2866 (RWS)
ESTELLE WEBER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-2870 (RWS)
ANTHONY PISANO, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3006 (RWS)
GREEK ORTHODOX ARCHDIOCESE FOUNDATION, by and through GEORGE KERITSIS, TRUSTEE, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3013 (RWS)

HANS MENOS, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3035 (RWS)
IRA GEWIRTZ, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3089 (RWS)
DREW V. LOUNSBURY, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3326 (RWS)
SHELDEN GREENBERG, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3334 (RWS)

SCOTT WETTERSTEN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-3351 (RWS)
RITA RUSIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et .al.*, Defendants.	Case No. 08-CV-3441 (RWS)
LAWRENCE FINK, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants	Case No. 08-CV-3602 (RWS)
FREDRICK S. SCHWARTZ, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-4972 (RWS)

GILLES BRANSBOURG, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-5054 (RWS)
DAVID MIZRAHI, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-05170 (RWS)
ANDREW E. JANES, on behalf of himself and all others similarly situated, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-05489 (RWS)
JOSEPH ZICHERMAN, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-6995 (RWS)
CARMELLA STARACE, INDIVIDUAL INVESTOR, Plaintiff, vs. THE BEAR STEARNS COMPANIES INC., *et. al.*, Defendants.	Case No. 08-CV-7335 (RWS)

MICHAEL RAND,

Plaintiff,

vs.

THE BEAR STEARNS COMPANIES INC., *et. al.*,

Defendants.

Case No. 08-CV-8194 (RWS)

***HOWARD* ERISA PLAINTIFFS' MEMORANDUM OF LAW**
IN RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

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Plaintiffs Aaron Howard and Shelden Greenberg (collectively, the "*Howard* ERISA Plaintiffs") hereby submit this memorandum of law in response to the Court's October 28, 2008 Order to Show Cause as to why the ERISA Cases[1] and Securities Cases[2] should not be consolidated.

I. INTRODUCTION

The Court's inquiry centers on whether the above-captioned ERISA actions should be consolidated with the above-captioned securities actions, each of which were filed in the wake of the recent troubles experienced by Bear Stearns. While the overlap in factual allegations militates in favor of coordinating these actions for pretrial purposes, the differences, as set forth herein, far outweigh any benefits and render consolidation an impractical alternative.

On March 17, 2008, plaintiff Aaron Howard ("Plaintiff Howard") filed the first ERISA Case in the United States District Court for the Southern District of New York against The Bear Stearns Companies Inc. ("Bear Stearns" or the "Company") and certain officers and directors of the Company, as well as fiduciaries of The Bear Stearns Companies Inc. Employee Stock Ownership Plan (the "Plan"). Plaintiff Howard filed suit on behalf of himself and a class of all persons who were participants in, or beneficiaries of, the Plan at any time between December 14, 2006 and the present. Shortly thereafter, eleven additional ERISA complaints were filed, including a complaint filed by plaintiff Shelden Greenberg ("Plaintiff Greenberg").

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[1] The following ERISA actions are currently pending before the Court and are collectively referred to herein as the "ERISA Cases": *Howard v. Bear Stearns Cos. Inc., et al.*, No. 08-2804 (S.D.N.Y. Mar. 17, 2008); *Weber v. Bear Stearns Cos. Inc., et al.*, No. 08-2870 (S.D.N.Y. Mar. 18, 2008); *Pisano v. Bear Stearns Cos. Inc., et al.*, No. 08-3006 (S.D.N.Y. Mar. 24, 2008); *Menos v. Bear Stearns Cos. Inc., et al.*, No. 08-3035 (S.D.N.Y. Mar. 25, 2008); *Gewirtz v. Bear Stearns Cos. Inc., et al.*, No. 08-3089 (S.D.N.Y. Mar. 26, 2008); *Lounsbury v. Bear Stearns Cos. Inc., et al.*, No. 08-3326 (S.D.N.Y. Apr. 3, 2008); *Greenberg v. Bear Stearns Cos. Inc., et al.*, No. 08-3334 (S.D.N.Y. Apr. 3, 2008); *Wettersten v. Bear Stearns Cos., Inc. et al.*, No. 08-03351 (S.D.N.Y. Apr. 4, 2008); *Rusin v. Bear Stearns Cos., Inc. et al.*, No. 08-03441 (S.D.N.Y. Apr. 8, 2008); *Fink v. Bear Stearns Cos., Inc. et al.*, No. 08-03602 (S.D.N.Y. Apr. 15, 2008); *Mizrahi v. Bear Stearns Cos., Inc. et al.*, No. 08-05170 (S.D.N.Y. June 5, 2008); and *Janes v. Bear Stearns Cos., Inc. et al.*, No. 08-05489 (S.D.N.Y. June 18, 2008).

[2] The following securities cases are currently pending before the Court and are collectively referred to herein as the "Securities Cases": *Eastside Holding, Inc. v. Bear Stearns Cos. Inc., et al.*, No. 08-2793 (S.D.N.Y.); *Becher v. Bear Stearns Cos. Inc., et al.*, No. 08-2866 (S.D.N.Y.); *Greek Orthodox Archdiocese Found. v. Bear Stearns Cos. Inc., et al.*, No. 08-3013 (S.D.N.Y.); *Schwartz v. Bear Stearns Cos. Inc., et al.*, No. 08-4972 (S.D.N.Y.); *Bransbourg v. Bear Stearns Cos. Inc., et al.*, No. 08-5054 (S.D.N.Y.); *Zicherman v. Bear Stearns Cos. Inc., et al.*, No. 08-6995 (S.D.N.Y.); *Starace v. Bear Stearns Cos. Inc., et al.*, No. 08-07335 (S.D.N.Y.); and *Rand v. Bear Stearns Cos. Inc., et al.*, No. 08-8194 (S.D.N.Y.). Additionally, two derivative cases are currently pending before the Court: *Birn v. Bear Stearns Cos. Inc., et al.*, No. 07-00855 (S.D.N.Y.); and *Cohen v. Bear Stearns Cos. Inc., et al.*, No. 07-10453 (S.D.N.Y.).

The gravamen of the ERISA Cases is that Defendants breached their fiduciary duties to plaintiffs and members of the class by, *inter alia*, failing to protect the Plan by making adequate disclosures and divesting the Plan of Bear Stearns stock when they knew, or should have known, that Bear Stearns stock was not a prudent investment option for the Plan. The *Howard* ERISA Plaintiffs seek damages pursuant to section 502 of the Employee Retirement Income Security Act ("ERISA"), as amended, 29 U.S.C. § 1132(a)(2). Under ERISA, defendants are responsible for restoring losses sustained by a plan as a result of defendants' breaches of their fiduciary duties.

Consolidation of the ERISA Cases pursuant to Fed. R. Civ. P. 42(a) is clearly appropriate; indeed, the ERISA Cases contain similar allegations and seek the same relief. However, because of the significant differences between the ERISA Cases and the Securities Cases – ***including different parties, claims, burdens, pleading standards, losses, and insurance*** – the *Howard* ERISA Plaintiffs submit that the ERISA Cases should not be consolidated with the Securities Cases, but rather should be coordinated for the limited purpose of certain common discovery.[3] Many federal courts, including in the Southern District of New York, take this standard approach when confronted with an ERISA case and a securities case with overlapping facts. For example, in the WorldCom ERISA and securities actions, after requesting that the WorldCom ERISA plaintiffs show cause why their cases should not be consolidated with the WorldCom securities actions, Judge Cote separately consolidated the ERISA and securities cases,[4] and then ordered the parties to coordinate discovery.[5]

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[3] Though not requested in the Order to Show Cause, the *Howard* ERISA Plaintiffs note that for the same reasons stated herein – including different parties, claims, burdens, pleading standards, losses and insurance – as numerous other courts have ordered in similar cases, the ERISA cases should not be consolidated with the Derivative Cases, but should be coordinated for the limited purpose of certain common discovery. *Life Enrichment Found. v. Merrill Lynch & Co.*, No. 07-9633 (S.D.N.Y. Mar. 12, 2008), attached hereto as Exhibit 1.

[4] *In re WorldCom, Inc. Sec. Litig.*, No. 02-3288 (S.D.N.Y. Sept. 18, 2002), attached hereto as Exhibit 2.

In fact, courts have followed this procedure in all of the large-scale ERISA company stock class actions involving parallel securities actions brought by Keller Rohrback or Schiffrin Barroway[6] in the Southern District of New York, including, for example, Judge Lynch in Global Crossing,[7] Judge Sprizzo in AIG,[8] Judge Sand in Merrill Lynch,[9] and Judge Kram in AOL[10] and Marsh.[11]

Moreover, not only are ERISA company stock class actions and parallel securities actions routinely coordinated as opposed to consolidated, but there are numerous recent examples where ERISA and securities actions involving some factual overlap have proceeded in front of different judges in a single district.[12]

Thus, the *Howard* ERISA Plaintiffs respectfully submit that the ERISA and Securities Cases should be *consolidated* separately and *coordinated* for pretrial purposes, as set forth in the *Howard* ERISA Plaintiffs' [Proposed] Pretrial Order No. 1.[13]

II. ARGUMENT

Several Securities Cases were filed in this court against Bear Stearns and certain officers and directors of the Company seeking recovery for violations of the federal securities laws. While the

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[5] Transcript of the Hearing at 9:8-12, 22:25-23:8, *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y. Nov. 16, 2002), attached hereto as Exhibit 3.

[6] Keller Rohrback L.L.P. represents Plaintiff Greenberg and Schiffrin Barroway Topaz & Kessler, LLP represents Plaintiff Howard (collectively, "*Howard* ERISA Plaintiffs' Counsel").

[7] *In re Global Crossing, Ltd. Sec. and ERISA Litig.*, No. 02-1472 (S.D.N.Y. Dec. 13, 2002), attached hereto as Exhibit 4.

[8] *Amidei v. Am. Int'l Group, Inc.*, No. 04-9387 (S.D.N.Y. Aug. 3, 2005), attached hereto as Exhibit 5.

[9] *Life Enrichment Found. v. Merrill Lynch & Co.*, No. 07-9633 (S.D.N.Y. Mar. 12, 2008), attached hereto as Exhibit 1.

[10] *In re AOL Time Warner ERISA Litig.*, No. 02-8853 (S.D.N.Y. Mar. 24, 2003), attached hereto as Exhibit 6.

[11] *In re Marsh ERISA Litig.*, No. 04-8157 (S.D.N.Y. Feb. 9, 2005), attached hereto as Exhibit 7.

[12] *See, e.g., Brieger v. Tellabs, Inc.*, 434 F.Supp.2d 567, 569 (N.D. Ill. 2006) (discussed *infra); In re Polaroid ERISA Litig.*, No. 03-CV-8335, 2007 U.S. Dist. LEXIS 51983 (S.D.N.Y. July 19, 2007) (Hon. William H. Pauley III); *In re Polaroid Corp. Secs. Litig.*, 465 F. Supp. 2d 232 (S.D.N.Y. 2006) (Hon. Sidney H. Stein); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02-CV-5893, 2006 U.S. Dist. LEXIS 36603 (N.D. Ill. Apr. 24, 2006) (10b-5) (Hon. Ronald A. Guzman); *Cokenour v. Household Int'l., Inc.*, No. 02- CV-7921, 2004 U.S. Dist. LEXIS 5286 (N.D. Ill. Mar. 30, 2004) (ERISA) (Hon. Samuel Der-Yeghiayan); *Tripp v. IndyMac Bancorp, Inc.*, No. 07-CV-1635, 2007 U.S. Dist. LEXIS 95445 (C.D. Cal. Nov. 29, 2007) (10b-5) (Hon. George H. Wu); *Moore v. Indymac Bancorp, Inc.*, 2:08-cv-04579-DDP-VBK (C.D. Cal) (ERISA) (Hon. Dean D. Pregerson).

[13] The *Howard* ERISA Plaintiffs [Proposed] Pretrial Order No. 1 was previously submitted to the Court on April 7, 2008, with the *Howard* ERISA Plaintiffs' Motion to Consolidate the ERISA Actions and Appoint Interim Lead Plaintiffs, Interim Co-Lead Counsel and Interim Liaison Counsel. An updated version of the *Howard* ERISA Plaintiffs [Proposed] Pretrial Order No. 1 is attached hereto as Exhibit 8.

ERISA Cases and the Securities Cases involve similar underlying conduct at Bear Stearns, the nature of the claims asserted in the ERISA Cases, and the liability alleged therein, are markedly different than the nature of the claims asserted in the Securities Cases pending against Bear Stearns. ERISA is a highly specialized field that involves a specific and dedicated set of statutes and legal standards. The claims in the ERISA Cases are based upon ERISA jurisprudence and involve defendants, class members, discovery, legal claims, defenses, and certain factual predicates that are unique and different from those in the Securities Cases.

By way of illustration, the differences between ERISA and securities actions become immediately apparent by simply looking at the applicable legal standards for proving the respective claims. When asserting breach of fiduciary duty claims under ERISA, a plaintiff must show that (1) a defendant was a fiduciary of an ERISA plan who, (2) acting within his capacity as a fiduciary, (3) engaged in conduct constituting a breach of his fiduciary duty. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 8853, 2005 U.S. Dist. LEXIS 3715, at *11 (S.D.N.Y. Mar. 10, 2005).

On the other hand, to prevail on a claim under § 10(b) of the Securities Exchange Act ("Securities Act") and Rule 10b-5, which are subject to heightened requirements under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. & in 18 U.S.C. § 1964) ("PSLRA"), a securities plaintiff must establish that "(1) defendant made a false statement or omission (2) of a material fact (3) with scienter (4) in connection with the purchase or sale of securities (5) upon which the plaintiff justifiably relied and (6) that the false statement proximately caused the plaintiff damages." *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 595 (7th Cir. 2006) (citing *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997)).

Because of these differences, in numerous similar actions in this circuit and throughout the country, courts have consistently ruled to separately consolidate ERISA and securities actions, thus preserving the rights of each set of class members to obtain the separate and distinct relief afforded by their respective statutory constructs.

1. The ERISA Cases Differ from the Securities Cases in Several Critical Respects, Making Consolidation Inappropriate.

The *Howard* ERISA Plaintiffs' claims are predicated upon a breach of fiduciary duty under the laws of ERISA. Specifically, the *Howard* ERISA Plaintiffs allege that Bear Stearns and the other fiduciaries of the Plan breached their fiduciary duties to the Plan by continuing to offer Bear Stearns stock as an investment option. The alleged breaches also include the Company's failure to adequately disclose to the Plan's participants and beneficiaries the risks of Company stock as a Plan investment, and the failure to address its own conflict of interest as the Plan sponsor and issuer of the stock, on the one hand, and as a fiduciary of the Plan on the other.

These allegations are, of course, not relevant to the Securities Cases. Moreover, because the ERISA Cases focus on the actions, or inactions, of the Plan's fiduciaries vis-à-vis the Plan's participants, and not the actions of the Company and senior management vis-à-vis the public markets, the ERISA Cases will inevitably vary, both procedurally and substantively, from the Securities Cases.

a. Varying Legal Standards

It is well settled that securities class claims have a higher burden of proof and are subject to a more stringent pleading standard than ERISA class claims. The District Court in *Brieger v. Tellabs, Inc.*, 434 F.Supp.2d 567, 569 (N.D. Ill. 2006), noted that motions to dismiss under ERISA would be assessed under "completely different, and more relaxed, standards" than those applicable to securities cases. The court further acknowledged that prior decisions in the Tellabs securities cases would have no bearing on the ERISA matters. *Id.* Accordingly, the court rejected defendants' motion to reassign the ERISA cases to the same judge who decided the Tellabs securities matters. *Id.*

Similarly, the court in *Lucent* recognized that any possible dismissal of a securities fraud case will not eliminate ERISA class claims. *In re Lucent Tech., Inc. ERISA Litig.*, No. CV-01-3491 (D.N.J. Feb. 11, 2002) ("The Court further finds that resolution of the securities class action, *In re Lucent Tech. Inc. Sec. Litig.*, No. 00-621 (JAP), will not necessarily resolve all issues in this [ERISA] matter.").[14] Indeed, in several similar cases, ERISA claims proceeded notwithstanding the dismissal of the securities actions. *See, e.g.*, *In re Goodyear Tire & Rubber Co. Sec. Litig.*, 436 F.Supp.2d 873, 905 (N.D. Ohio Mar. 22, 2006) (dismissing the consolidated securities class action); *In re Goodyear Tire & Rubber Co. ERISA Litig.*, 483 F.Supp.2d 783, 796 (N.D. Ohio July 6, 2006) (court denied the dismissal of the ERISA action, noting that ERISA "does not have heightened pleading standards," and "the Court is not inclined to make Plaintiffs prove their case without the benefit of an evidentiary record"); *Urban v. Comcast Corp.*, 2008 U.S. Dist. LEXIS 87445, at *27-29 (E.D. Pa. Oct. 28, 2008) (court denied the dismissal of the ERISA action even though the court dismissed the securities fraud action).

Therefore, in the ERISA Cases, even in the unlikely event that Defendants are successful on a motion to dismiss the securities fraud class claims, the ERISA class claims would continue to be litigated.

b. Varying Class Composition and Theories of Certification

The Securities Cases and the ERISA Cases also seek to represent different classes. The class members in the Securities Cases are purchasers of Company securities, while class members in the ERISA Cases are participants and beneficiaries of the Plan. Moreover, not only will class composition differ, so too will the theory of class certification. Certification of securities fraud claims is typically sought under Fed. R. Civ. P. 23(b)(3), in which class members may elect to opt out of the certified proceeding. ERISA claims, on the other hand, are typically certified under Fed. R. Civ. P. 23(b)(1), which ordinarily does not afford members an ability to opt out of the class proceeding and which does not mandate that class notice be disseminated. Furthermore, in an ERISA claim, a class member can be a *holder*, in addition to a *purchaser*, of company stock. *See In re IKON Office Solutions, Inc.*, 191 F.R.D. 457 (E.D. Pa. 2000) (court certifies plaintiffs' ERISA 401(k) breach of fiduciary class that includes "holder" claims).

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[14] Attached hereto as Exhibit 9.

c. Damage Theories are Different

The Securities Cases and the ERISA Cases also proceed under different theories of damages. In a securities fraud case, damages are measured by the difference between the price of stock as influenced by fraud and the stock's true value. In an ERISA case, however, damages may be measured in various ways. For example, damages in an ERISA case may be measured by the difference between the most profitable alternative investment available to the plan and the challenged investment. *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d. Cir. 1982).

d. The PSLRA is not Applicable to the ERISA Cases

Another critical difference between the Securities Cases and the ERISA Cases is that ERISA class claimants are not governed by the PSLRA. The PSLRA imposes a higher pleading standard on securities claims, different mechanisms for selection of lead plaintiff and lead counsel, and discovery stays. None of this is applicable to the ERISA Cases. In the many similar cases litigated by the *Howard* ERISA Plaintiffs' Counsel, court after court has made clear that ERISA cases are not subject to the PSLRA stay, nor controlled by the pleading requirements imposed by the PSLRA.[15] For example, in rejecting a defense motion to stay the ERISA case pending the outcome of a parallel securities action, the court in *In re JDS Uniphase Corp. ERISA Litig.*, 2005 U.S. Dist. LEXIS 17503 (N.D. Cal. July 14, 2005), stated:

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[15] ERISA Plaintiffs' Counsel refer the Court to following orders entered by courts outside the U.S. District Court, Southern District of New York in which ERISA cases were separately consolidated from securities cases: *In re Lucent Tech., Inc. ERISA Litig.*, No. 01-3491 (D.N.J. Feb. 11, 2002), attached hereto as Exhibit 9 (court denied Lucent's

> The motion is not well taken. The respective plaintiffs' classes are disparate, both in terms of membership and the class periods. Moreover, the issues raised by the two actions are distinctly different. Although there is some overlap in the corporate fraud allegations, the dispositive issues in this action turn on alleged breaches of fiduciary duties under ERISA while the issues in the securities litigation turn on alleged violations of the securities acts.

Id. at *46-47.

Thus, by consolidating the ERISA Cases and the Securities Cases separately, the Court will avoid the inequitable result of subjecting the ERISA Cases to the statutory stay unnecessarily, and may grant discovery in the ERISA Cases as appropriate.

e. The ERISA Cases and the Securities Cases are Fundamentally Distinct

Finally, from a public policy standpoint, the differences between the ERISA Cases and the Securities Cases further militate against consolidation. The fundamental purpose of the securities laws is, of course, to vindicate America's regulatory scheme of open and honest securities markets. And the purpose of private securities litigation is to reimburse market purchasers, to the extent liability is established and funds permit, for their losses as a result of purchasing stock at inflated prices. Securities fraud class actions are very common, and the PSLRA regulates in considerable detail the prosecution of such cases, including the selection of lead claimants and counsel, the consolidation of all complaints into a single omnibus complaint, the timing of motions to dismiss, discovery, and so on.

In contrast, ERISA, as its name makes clear, is designed to foster and protect "employee retirement income security." To this end, the fiduciary responsibility sections of ERISA borrow

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motion to stay the ERISA cases pending outcome of the securities cases); *In re Enron Corp. ERISA Litig.*, No. 01-3913 (S.D. Tex. Jan. 18, 2002), attached hereto as Exhibit 10 (court stated that it "seeks to reassure Plaintiffs that it does not intend to rigidly impose on the ERISA cases the delayed schedule or procedural hoops required for the securities fraud cases governed by the PSLRA"); and *In re Dynegy, Inc. ERISA Litig.*, No. 02-3076 (S.D. Tex. Mar. 31, 2003), attached hereto as Exhibit 11 (court allowed ERISA-only discovery, over defendants' objection, during the pendency of the PSLRA in the related securities action).

from the common law of trusts and oblige "fiduciaries," *i.e.*, the trustees, of an ERISA employee benefit plan to act *solely* in the interests of their beneficiaries. ERISA § 404(a)(1) (29 U.S.C. § 1104(a)(1)). In the words of the Second Circuit, fiduciaries must act with an "eye single to the interests of the participants and beneficiaries." *Donovan v. Bierwirth*, 680 F.2d at 271. Should they breach their fiduciary duties, including the traditional duties of loyalty and prudence, the statute provides that breaching fiduciaries are obliged "to make good to such plan any losses to the plan." ERISA § 409 (29 U.S.C. § 1109).

To help further elucidate the differences between the ERISA Cases and the Securities Cases, several critical distinctions between these cases are summarized in the table below:

Issue	**ERISA Cases**	**Securities Cases**
Plaintiffs	Participants and beneficiaries in the Plan	Purchasers of Bear Stearns securities
Defendants	Bear Stearns, its officers and directors, and other fiduciaries, as fiduciaries of the Plan	Bear Stearns as issuer and its senior management
Class Type	Rule 23(b)(1) – notice and opt out not required	Rule 23(b)(3) – notice and opt out required
PSLRA Applicable	No	Yes
Theory of Liability	ERISA breaches of fiduciary duty	Securities fraud
To Whom Duty Owed	Plan participants and beneficiaries	The market as a whole
Nature of Duty	To prudently select and monitor the Plan's investments; to provide "complete and accurate information"; to avoid conflicts of interest, etc.	Neither to make untrue statements of material fact nor to fail to state material facts necessary to make the statements made not misleading
Compensable Damages	Loss suffered by the Plan as the result of breach of duty	Loss suffered by securities purchasers as the result of inflated prices
Key Facts	Actions and/or inactions of the Plan fiduciaries, including their communications with the Plan's participants and beneficiaries	Actions of Bear Stearns, its officers, and accountants with respect to misleading public statements

Key Documents	Plan documents and minutes of Plan committee meetings	Securities filings and press releases
Key Witnesses	Plan administrators and professionals hired by the Plan	Senior management
Jury Trial	No	Yes

III. CONCLUSION

The ERISA and Securities Cases feature different applicable legal standards, different putative classes and theories of class certification, different theories of recovery, different means for measuring damages, and entirely distinct statutory frameworks. In short, while there is some factual overlap between the ERISA and Securities Cases, differences abound. The type and extent of these distinguishing factors make consolidation impractical and inappropriate.

Based on the foregoing, the *Howard* ERISA Plaintiffs respectfully submit that the ERISA Cases should be consolidated separately from the Securities Cases and that the ERISA Cases should be coordinated with the Securities Cases for the limited purpose of certain common discovery.

Dated: November 14, 2008.

Respectfully submitted,

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